IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JURISDICTION

A.O.NO.460 OF 2004

Suresh Bhibaji Tikone
& Ors. .. Appellants

vs.

Chagan Rambhau Tikone
& Ors. .. Respondents.

Shri S.A.Sawant & H.V.Kode, Advocate for the Appellants.

Shri S.V.Sadavarte, Advocate for Respondent No.7.

CORAM : A.S.OKA, J.

DATED : 28th February, 2005.

P.C. :

1. Admit. Mr. Sadavarte, appearing for the Respondents waives service. By consent taken up forthwith for final disposal.

2. The challenge in this Appeal from Order is to the judgment and order dated 29.3.2004 passed by the learned trial Judge below application at exhibit 48. By the said application at exhibit 48 the appellants/plaintiffs prayed that the

Respondent No.7 should be restrained from developing the property subject matter of the suit and be further restrained from selling the plots out of the suit property.

3. On 27.4.2004 this Court passed following order :

> "Any third party interest that may be created henceforth by the Respondents shall be subject to the orders to be passed at the admission of this Appeal from Order.
>
> Further, the Respondents shall inform the third parties in whose favour they may henceforth create a right in respect of the suit property about any change in the nature of the suit land i.e. from agricultural to non agricultural and of this order as well as the pendency of the above proceedings."

4. Shri Sawant, learned Advocate appearing

for the Appellants submitted that the Respondent No.7 has executed a sale deed in favour of one Sharmila Ghatpande on 5.6.2004. He submitted that there is nothing on record to show that before executing the sale deed in favour of the said Sharmila Ghatpande, the Appellant complied with the directions of this Court in the order dated 27.4.2004. He submitted that a public notice was published at the instance of the Appellants in the daily newspaper on 14.5.2004 and even thereafter work of development is in progress on the suit property. He submitted that the suit filed by the Appellants is for declaration and injunction and therefore pending final disposal of the suit the Respondent No.7 cannot be permitted to create third party interest and to develop any part of the suit property.

5. Shri Sadavarte appearing for the Respondents pointed out that alongwith the suit, an application for temporary injunction was made at exhibit 5 by the Appellant Plaintiffs and the said application has been rejected by judgment and order dated 28.8.2001. He submitted that the

order passed on application at Exhibit 5 had attained finality. He, therefore, submitted that no interference is called for. He has invited my attention to the affidavits filed by the constituted attorney of Respondents Nos.2, and 4 to 6. He submitted that before entering into transaction with one Sharmila Ghatpande compliance is made with the order of this Court. In reply to the said submissions Shri Sawant submitted that the prayers made in the application exhibit 5 and exhibit 48 are different and therefore the order passed in application exhibit 5 will not come in the way of the Appellants.

6. I have considered the rival submissions. The prayer made in the exhibit 5 was for restraining the Respondent No.7 from creating third party interest in respect of the suit property and from dispossessing the appellants from the suit property. By detailed judgment the learned Judge rejected the said application. Admittedly the order rejecting the said application is not challenged by the appellants. Prayer in the application at exhibit 48 is for

restraining the Respondent No.7 or this agents and servants from developing the suit property and restraining the Respondent No.7 from creating third party interest in respect of the suit property. It cannot be disputed that the prayers made in both the applications at exhibit 48 and exhibit 5 are substantially the same. Though certain subsequent events have been alleged in the application at exhibit 48, once prayer made by the Appellants for injunction restraining the Respondent No.7 from creating third party interest was rejected while deciding the application at exhibit 5, the Appellants were not entitled to the relief prayed for in the application at exhibit 48.

7. It is to be, however, noted that the substantive suit for declaration and injunction filed by the appellants is pending. In view of this position, this Court passed ad-interim order on 27.4.2004 directing that creation of third party interest will be subject to further orders in appeal and that before creating third party interest the appellant shall inform the third

parties about the pendency of the proceedings. With a view to safeguard the interests of the appellants such direction deserves to be granted till the final disposal of the suit. Shri Sawant submitted that there is no compliance made by the Respondent with order dated 27.4.2004 while executing the sale deed in favour of one Sharmila Ghatpande. It is for the Appellants to take out appropriate proceeding in that behalf and in this appeal I am not recording any finding on that aspect.

8. Hence the appeal is disposed of by passing following order.

(i). In the event the Respondents desire to create further third party interest in the suit property or any part thereof, the Respondents will inform the prospective purchaser about the pendency of the suit and about this order.

(ii) All third party interests created by the Respondents during the pendency of the suit will be naturally subject to the final order which may

be passed in the suit.

(iv) The trial Court will decide the suit on its own merits uninfluenced by the tentative findings recorded in the impugned judgment and order.

(v) All contentions of the parties on merits of the suits are expressedly kept open. There will be no order as to costs.

. All parties and concerned Court will act on the authenticated copy of this order.

(A.S.Oka, J.)